12

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 841

MRS. C. D. PIERCE, TRUSTEE OF THE ESTATE OF J. A. KUNKEL, BANKRUPT, PETITIONER,

VS.

J. A. KUNKEL, B. F. EDWARDS, J. K. FORD, JR., C. M. KENNEDY, LIBERTY NATIONAL BANK IN PARIS, TEXAS, AND RED RIVER NATIONAL BANK IN CLARKSVILLE, TEXAS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

and

BRIEF IN SUPPORT THEREOF.

OTIS HAROLD WOODROW,
Sherman, Texas,
Attorney for Petitioner.

INDEX

Petition for Writ of Certiorari

Brief in Support of Petition for Writ of Certiorari

TABLE OF CASES

STATUTES

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

MRS. C. D. PIERCE, TRUSTEE OF THE ESTATE OF J. A. KUNKEL, BANKRUPT, PETITIONER,

VS.

J. A. KUNKEL, B. F. EDWARDS, J. K. FORD, JR., C. M. KENNEDY, LIBERTY NATIONAL BANK IN PARIS, TEXAS, AND RED RIVER NATIONAL BANK IN CLARKSVILLE, TEXAS, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Mrs. C. D. Pierce, Trustee in the matter of John A. Kunkel, bankrupt, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to review the final judgment entered in the above cause on December 7, 1945 (151 F. 2d 897) (R. p. 146), petition for rehearing having been denied on the 28th day of December, 1945 (R. p. 160).

SUMMARY STATEMENT.

Your petitioner, as Trustee in Bankruptcy, brought this action under the provisions of Section 70 (a) and Section 70 (e), paragraphs 2 and 3, of the National Bankruptcy Act, against the bankrupt, John A. Kunkel, and his assignees, who are the respondents herein, to recover the sum of $18,499.96, the proceeds of a wrongful transfer and collection AFTER BANKRUPTCY, of an unscheduled and unadministered asset, which indebtedness arose out of the advancement of money by the bankrupt BEFORE BANKRUPTCY to Red River County, Texas, and used by that county in the construction of a State highway.

The antecedent facts as reflected by the documentary evidence in this record consisting of the Acts of the Legislature, and the Orders and Resolutions of the Commissioners' Court of Red River County are submitted below:

During the year 1919 Red River County, Texas, with both State and Federal aid commenced the construction of of a public road within the county, which was known as State Highway No. 37 (R. pp. 64-65, Minutes of the Commissioners' Court).

The County was in an impoverished condition at the time the demand was made upon it for the payment of its pro rata part of the cost of such road construction, and the bankrupt, John A. Kunkel, at the special instance and request of the Commissioners' Court advanced to the county the sum of $18,499.96 to be used by the county for the payment of the indebtedness then due and owing by the county for the construction of such State Highway (Act of the Texas Legislature, H. B. No. 725 (R. p. 67) and the Minutes of the Commissioners' Court (R. pp. 74-75-76)).

Thereafter John A. Kunkel became insolvent, and he was on November 6, 1929, adjudicated a bankrupt upon his voluntary petition (R. p. 2, p. 44).

The bankrupt did not schedule as an asset the indebtedness due him by the county, and such asset was not administered (R. pp. 44-64).

The bankrupt and his assignees expressly waived their defense of abandonment (R. p. 64).

The bankruptcy proceedings were closed February 17, 1934.

On August 30, 1932, at a special session of the Texas Legislature there was enacted legislation having for its purpose the relief of county and road districts which had become impoverished because of heavy debt burdens which they had incurred in the construction of State Highways and providing for the retirement of such indebtedness out of a state fund, and known as "County and Road District Highway Fund," which fund was to be derived from the excise taxes collected by the State in the sale of gasoline, 1/4 of such excise tax being allocated for the maintenance of such funds (Texas Civil Statutes, Article 6674 q-6) *Jefferson County* v. *Board of County and District Road Indebtedness,* 182 S. W. 2d 908 (Supreme Court of Texas), and *Johnson* v. *Ferguson,* 55 S. W. 2d 153 (Court of Civil Appeals), construing the act, expressly prohibited the assumption by the State of such indebtedness, and also prohibited the use of these funds for the granting of gifts, gratuities or rewards and expressly limited the use of the fund to the payment of debts owing by the County and Road Districts, which had accrued in the construction of state highways.

Upon being informed of the passage of such act, (R. p. 108) and after the bankrupt received his discharge, and after the proceedings in bankruptcy were closed, the

bankrupt employed a corps of attorneys for the purpose of prosecuting his claim and recovering the money he had so advanced to the county (R. p. 50).

In the prosecution of this claim, the bankrupt, John A. Kunkel, and his staff of lawyers, labored "two, three or four months" (R. p. 109) before the State Legislature (R. pp. 53 and 98) and procured the passage of House Bill 725 (R. p. 67), causing the Legislature to investigate the circumstances surrounding the advancement, and the conditions under which such advancement was made, and caused the Legislature to affirmatively set out the facts so found as a basis for the return of this money.

These facts so represented by the bankrupt and his assignees, and so found by the Texas Legislature at their instance, are:

That Red River County's proportionate share of the cost of the construction of State Highway No. 37 was the sum of $20,164.94 (R. p. 67); that the money so allocated to the county as its proportion of the cost of road construction was advanced by the bankrupt, and the county appropriated out of the bankrupt's private funds this money in order that the construction of this State Highway might be completed, and that the advancement so made by the bankrupt was on account of the impoverished condition of the county at the time the demand was made upon said county for its pro rata part of construction, and that the advancement was made by the bankrupt at the special instance and request of the Commissioners' Court of Red River County (R. p. 68).

The intentions and purposes of the Legislature in passing the Act were expressly stated in the Special Act as shown by the following excerpts from it:

"It is the purpose and intent of this Act to declare the indebtedness thus created by the County of Red River to be such an evidence of indebtedness as to come within the terms of Acts, 1932" (R. p. 69).

"To declare the validity of certain indebtedness arising out of the construction of State Highway No. 37 in Red River County" (R. p. 67).

"To place such indebtedness on a parity with bonds, warrants and other evidences of indebtedness heretofore authorized to be paid out of the County and Road District Highway Fund" (R. p. 67).

"That the amount so determined to have been actually expended in the construction of that part of State Highway 37 in Red River County * * * *is hereby declared to be a valid indebtedness* of Red River County, and such indebtedness is eligible to be paid upon a parity with and for the same force and effect as the bonds, warrants or other evidences of indebtedness issued by counties and defined road districts, etc." (R. p. 69).

The Legislature further provided that before the debt was actually paid, the account should be audited and the amount completely verified and actually determined by the Board of County and District Road Indebtedness (R. p. 69).

Nowhere in this Special Act was the word "gift," "gratuity" or "reward" used, and no combination of words was used having that meaning. On the contrary, the Legislature did use the word "indebtedness" not less than fifteen times in reference to the repayment of this money to the bankrupt.

The Texas Legislature found that it was necessary to pass the Special Act because—

"The present Statutes with reference to the participation by the State in the reimbursement of coun-

> ties for county and road district bonds, warrants and other evidences of INDEBTEDNESS INCURRED FOR CONSTRUCTION OF STATE HIGHWAYS makes no provision for the reimbursement by the State of THE INDEBTEDNESS THUS CREATED BY THE COUNTY OF RED RIVER because of the peculiar and unusual character of SUCH INDEBTEDNESS" (R. p. 68) (Emphasis ours).

The "present statutes" referred to by the Texas Legislature has reference to Vernon's Texas Civil Statutes, Article 6674, etc., and particularly to Article 6674 q-7, which in part provides that:

> "All bonds, warrants or other evidences of indebtedness heretofore issued by counties or defined road districts of this state, which mature on or after January 1, 1933, * * * shall be eligible to participate in the distribution of the moneys coming into said COUNTY AND ROAD DISTRICT HIGHWAY FUND."

As a prerequisite of the eligibility to participate in such special fund, it was necessary that a valid and legal pre-existing indebtedness be due and owing *by the county*, arising from road construction, and that such indebtedness be evidenced by bonds, warrants or other evidences of indebtedness *issued by the county*.

Because the indebtedness due the bankrupt by Red River County was upon an *"implied obligation"* rather than upon bonds, warrants or other written evidence of indebtedness, it was necessary for the Texas Legislature to pass the Special Act, and to determine: (1) that a valid and legal indebtedness owing by the county arose out of the advancement of money made by the bankrupt to the county; (2) to authorize the issuance of INTEREST BEARING COUNTY WARRANTS in recognition of such pre-existing debt; and (3) to place such warrants on a

parity with bonds, warrants and other evidences of indebtedness heretofore authorized to be paid out of the "County and Road District Highway Fund."

This the Texas Legislature did, and in so doing, *such indebtedness remained the indebtedness of the county.* The State did not *assume* or *obligate itself* to pay such warrants either directly or indirectly or contingently; nor did the State pledge its credit in any manner whatsoever, according to the express provisions of Vernon's Civil Statutes, Article 6674 q-7(a) (See construction of the statute by the Texas Supreme Court in *Jefferson County* v. *Board of County and District Road Indebtedness,* 182 S. W. 2d 908).

Thereafter the bankrupt and his assignees, who are the respondents herein, presented their claim to the Commissioners' Court of Red River County for the repayment of this money (R. p. 53) (Admission of Respondent, C. M. Kennedy).

They were instrumental in procuring from such court an adjudication of their claim by the presentation to that court of the facts and circumstances surrounding the advancement, and were instrumental in having the necessary orders and resolutions entered upon the minutes of the Commissioners' Court authorizing the repayment of this money.

As a basis for the issuance and delivery of the INTEREST BEARING COUNTY WARRANTS, the Commissioners' Court of Red River County expressly adopted the fact findings of the Texas Legislature as set out in the Special Act, and the Commissioners' Court copied the entire act into its orders and further declared that:

> "This court now finds and determines that the sum of $18,499.96 IS THE AMOUNT OF INDEBTEDNESS DUE THE SAID JOHN A. (J. A.) KUNKEL,

> HIS HEIRS OR ASSIGNS, under the terms of said House Bill No. 725, and this court finds THAT SAID SUM NOR ANY PART THEREOF HAS BEEN REPAID to said John A. (J. A.) Kunkel, his heirs or assigns" (R. p. 75) (Emphasis ours).

And the Commissioner's Court further ordered that:

> "Said warrants shall be delivered to and accepted by said John A. (J. A.) Kunkel, his heirs or assigns, in full settlement of the indebtedness due them by Red River County, Texas, as hereinabove set out" (R. p. 77) (Emphasis ours).

When these INTEREST BEARING COUNTY WARRANTS were about to be delivered, the Red River National Bank in Clarksville, one of the respondents, filed an application in the District Court to re-open the bankruptcy proceedings, alleging under oath that these INTEREST BEARING COUNTY WARRANTS were assets of the bankruptcy estate, being in payment of an indebtedness which existed before and at the time of the intervention of bankruptcy (R. p. 78), that the bank was a creditor of the estate holding a claim in the sum of $38,809.46 (R. p. 93).

While the bank's application to re-open this bankruptcy estate was pending, the bank forced the bankrupt, John A. Kunkel, to cut it in on a division of this money, independent of the bankruptcy court, agreeing to move to dismiss its petition to re-open if permitted to participate in the distribution. If not, then the bankrupt's creditors would, if the proceedings were re-opened, receive all of this money, and the bankrupt would get nothing (R. pp. 106-107).

Under this character of duress, the bankrupt paid to the Red River National Bank in Clarksville the sum of $3,130 out of these funds, and each of the respondents

shared in the distribution of the funds, to the exclusion of the bankrupt's creditors.

The bank then transferred and assigned to the bankrupt its claim in bankruptcy (R. p. 92).

This claim was then barred by the Statute of Limitations and had already been discharged in bankruptcy (R. p. 106). In this assignment the bank authorized the bankrupt to assert the bank's claim in the bankruptcy proceedings. The estate had been made barren and without any possibility of dividend by the wrongful appropriation by the bankrupt and his assignees of this sole remaining asset.

The bankrupt is now prosecuting a suit in the state courts against the bank for the return of this $3,130 (Testimony of the bankrupt, R. p. 107).

After the bank received a division of these funds, it filed its motion to dismiss its application to re-open the bankruptcy proceedings, which the court overruled (R. p. 86).

The bankruptcy proceedings were reopened; your petitioner was thereafter appointed Trustee and was authorized to prosecute this suit.

The Trustee in Bankruptcy giving full faith and credit to the acts of the Texas Legislature, and to the orders and resolutions of the Commissioners' Court, as identifying and conclusively determining the character and identity of the indebtedness thus collected, pled and proved the acts of the Legislature and the orders and resolutions of the Commissioners' Court and asserted that under the facts and conclusions made and found by these tribunals, this indebtedness passed to and vested in the Trustee in Bankruptcy as a matter of law, and was accordingly an asset of the bankruptcy estate of John A. Kunkel under the provisions of Section 70 (a) of the National Bankruptcy Act.

The bankrupt and his assignees answered alleging that the money so received by them was not in payment of a pre-existing debt, but was on the contrary a mere gift, gratuity or reward granted to them by the State of Texas (R. pp. 7; 16; 25; 26; 29).

The Trustee by supplemental complaint (R. p. 37) pled that the facts found and the conclusions made by the Texas Legislature and by the Commissioners' Court, were not open to judicial investigation and review; that such findings and conclusions constituted a complete bar to the defense offered, and that the bankrupt and his assignees were estopped to deny the truth thereof, they having received this money alone upon the basis of the truth of these facts.

At the trial, the court permitted the bankrupt to testify over the objection of the Trustee (R. p. 114), denying and contradicting the facts that he himself procured from the Texas Legislature and the Commissioners' Court, and permitted him to say that he merely made a gift of the money to the county (R. p. 95).

The trial court overruled the Trustee's objections to this parol testimony and refused to strike the evidence, for which action of the court the Trustee was allowed an exception (R. p. 118).

Based alone upon this parol testimony of the bankrupt, the trial court found that the repayment of this money "constituted a mere gift and reward to John A. (J. A.) Kunkel for his having donated to the construction of a portion of Texas State Highway No. 37" (R. p. 126).

Based upon this finding, the trial court rendered judgment that the Trustee recover nothing herein (R. p. 127).

Upon appeal to the Circuit Court of Appeals, that court affirmed the judgment of the trial court upon the conclusion that the debt collected by the bankrupt and his assignees "WAS CREATED by the Special Act of the Legislature" (R. p. 148).

The Circuit Court further concluded that although the bankrupt and his assignees actually collected this money upon representations to the State Legislature and the Commissioners' Court, that the advancement made by the bankrupt to the county created a valid and legal pre-existing debt due and owing BY THE COUNTY to the bankrupt which arose prior to bankruptcy, and the further fact that the bankrupt and his assignees accepted the repayment of this debt after bankruptcy upon the written stipulation entered in the minutes of the Commissioners' Court reading:

> "That said warrants shall be delivered to and accepted by the said John A. (J. A.) Kunkel, his heirs or assigns, in FULL SETTLEMENT OF THE INDEBTEDNESS DUE THEM BY RED RIVER COUNTY, TEXAS" (R. p. 77) (Emphasis ours).

that the bankrupt and his assignees were nevertheless not estopped to deny the truth of these representations which they had made to the Texas Legislature and the Commissioners' Court for the purpose of collecting this money.

QUESTIONS SUBMITTED.

(1) Is not the holding of the Circuit Court "* * * that the debt WAS CREATED by the Special Act of the Legislature" a self-contradicting and erroneous statement of law, a debt being an obligation or demand arising out of a contract, either express or implied, and the Circuit Court having declared that no contract, express or implied, arose out of the advancement of money by the bankrupt to the county?

(2) Does not the rule that the Federal Court should never declare that a Legislature violated its own State

Constitution, if any other reasonable construction may be placed upon the Act, require the Special Act to be construed according to its plain language that a legal and valid county obligation arose out of the advancement of money by the bankrupt, rather than that the Legislature made a donation of money out of the "County and Road District Highway Funds," which is expressly forbidden by Article III, Sections 50, 51 and 52 of the Texas Constitution, as construed by the Texas Supreme Court in *Jefferson County* v. *Board of County and District Road Indebtedness,* 182 S. W. 2d 908?

(3) The Texas Legislature acting within its constitutional powers in authorizing the expenditure of the public money, having found, at the instance of the bankrupt, that the advancement of money to the county by the bankrupt was at the special instance and request of the Commissioners' Court because of the impoverished condition of the county at the time the demand was made upon the county for its *pro rata* part of the cost of the construction of a State Highway, and the State Legislature having concluded from such facts that a valid and legal obligation arose therefrom due by the county to the bankrupt, and on the basis of such facts, having authorized its payment, is such decision thereafter subject to judicial investigation and review in this collateral matter, and upon such re-examination, was it proper for the trial court to find that the advancement was not made at the instance and request of the Commissioners' Court, as found by the Legislature, but was on the contrary made upon the unsolicited proposal of the bankrupt himself, and based upon such conflicting findings, concluded that the State made a gift to the bankrupt out of the public treasury in violation of Article III, Sections 50, 51 and 52 of the State Constitution?

Does not the rule announced by this court in *U. S.* v. *Carolene Products Company,* 304 U. S. 144, 58 S. Ct. 778; *Chesebro* v. *Los Angeles County Food Control District et al.,* 306 U. S. 459, 59 S. Ct. 622; and *Clark Directory of Motor Vehicles et al.* v. *Paul Gray,* 306 U. S. 583, 59 S. Ct. 744, forbid such action by the trial court?

(4) Is the adjudication of the bankrupt's claim by the Commissioners' Court (which is a constitutional court vested with exclusive jurisdiction to pass upon claims against the county—*Yoakum County et al.* v. *Gaines County,* 163 S. W. 2d 393, by the Supreme Court of Texas) thereafter subject to re-examination and review, in this collateral matter, and is such adjudication subject to being revised or set aside by the trial court upon the parol testimony of the bankrupt, at whose instance and upon whose representations the Commissioners' Court acted in declaring that the county was in fact legally indebted to the bankrupt and upon which findings alone the county actually paid and the bankrupt actually received the funds, which the Trustee here seeks to recover solely upon faith in the truth of such representations and the conclusive effect of the action of the Commissioners' Court in declaring the legality and validity of such indebtedness? *In other words—may the bankrupt acquire these funds upon the representation of one state of facts, and then retain such funds upon an entirely contradictory state of facts?*

(5) As against the Trustee's plea of *res judicata* and of *estoppel,* may the bankrupt and his assignees, after having procured from the Commissioners' Court of Red River County, an order directing that this pre-existing debt be paid upon the following written stipulation, to-wit:

> "That said warrants shall be delivered to and accepted by said John A. (J. A.) Kunkel, his heirs or

> assigns, in full settlement of the indebtedness due them by Red River County, Texas, as hereinabove set out" (R. p. 77).

and after receiving the payment of such indebtedness based upon such stipulation, be permitted by the parol testimony of the bankrupt, to contradict and deny that this money was received in payment of such indebtedness, and defend the Trustee's action on the ground that the money was on the contrary received as a mere gift, gratuity or reward?

(6) Did the debt which arose PRIOR TO BANKRUPTCY out of advancements of money by the bankrupt to Red River County, and which was AFTER BANKRUPTCY recognized as a valid debt by the Texas Legislature and by the Commissioners' Court, pass to and vest in the Trustee as a part of the bankrupt's estate under the provisions of Section 70 (a) of the National Bankruptcy Act, under the authority of *Williams* v. *Heard et al.*, 140 U. S. 529, 11 S. Ct. 884; *Milnor* v. *Metz*, 16 Pet. 221; *Erwin* v. *United States*, 97 U. S. 392; and *Comegys* v. *Vasse*, 1 Pet. 193; *Clark* v. *Clark*, 17 How. 315, 15 L. Ed. 77; *Phelps* v. *McDonald*, 99 U. S. 298, 25 L. Ed. 473?

REASONS FOR ALLOWANCE OF WRIT.

(1) This case involves the No. I problem in the administration of the National Bankruptcy Act. *i. e.*—the preservation of the assets of such estates for the benefit of the creditors. In this case the bankrupt received the highly remedial benefits of the act, including a discharge from his debts, and has been permitted to acquire wrongfully and retain a major portion of his assets. The effect of the opinion is to encourage those who seek wrongfully to acquire the assets of bankruptcy estates, and to

discourage trustees generally in their effort to prevent such wrongs.

(2) The importance of the matters presented lies in the fact that the decision of the Circuit Court overrules (or fails to follow) every opinion of this honorable court upon the issues involved, and embarks upon an entirely new and novel theory of the law governing the rights of the creditors of a bankruptcy estate.

(3) The decision of the Circuit Court is clearly in conflict with the principle of law laid down by this honorable court in *Milnor* v. *Metz,* 16 Pet. 221, in which it was held that a claim for extra pay for services rendered, which although presented to Congress prior to adjudication, was not recognized by that body or satisfied until afterwards, passed to the assignee as a part of the bankrupt's estate, notwithstanding the defense that the government was the debtor and the claim rested on its discretion; or in other words, that it was as uncertain as the pleasure of Congress, and until the act was passed subsequent to bankruptcy, no claim existed against the United States which could be recognized as "property or effects" of the insolvent.

(4) The decision of the Circuit Court is clearly in conflict with the principle of law laid lown by this honorable court in the case of *Williams* v. *Heard et al.,* 140 U. S. 529, 11 S. Ct. 884, in which this court announced the rule that:

> "* * * nevertheless, there was at all times a MORAL OBLIGATION on the part of the government to do justice to those who had suffered in property. * * * There was thus at all times A POSSIBILITY that the government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the

> passage of the act of congress for the distribution of the fund. But the act of congress did not create the rights. THEY HAD EXISTED AT ALL TIMES SINCE THE LOSSES OCCURRED. THEY WERE CREATED BY REASON OF LOSSES HAVING BEEN SUFFERED. * * * IT IS ENOUGH THAT THE RIGHT EXISTS WHEN THE TRANSFER IS MADE, NO MATTER HOW REMOTE OR UNCERTAIN THE TIME OF PAYMENT. The latter does not affect the former. * * * Vested rights *ad rem* and *in re*—possibilities coupled with an interest on claims growing out of property—pass to the assignee."

(5) The opinion of the Circuit Court is clearly in conflict with the prior decisions of this honorable court in the cases of *Erwin* v. *United States,* 97 U. S. 392; *Comegys* v. *Vasse,* 1 Pet. 193, 7 L. Ed. 108; and *Phelps* v. *McDonald,* 99 U. S. 298, 25 L. Ed. 473.

(6) The decision of the Circuit Court in holding "* * * that the debt WAS CREATED by the Special Act of the Legislature" is in conflict with the established and well settled fundamental law of Texas, Texas Constitution, Article III, Section 49, providing that:

> "No debt SHALL BE CREATED by or on behalf of the State except to * * * pay existing debt."

as construed in the case of *Jefferson County* v. *Board of County and District Road Indebtedness,* 182 S. W. 2d 908, and in *State* v. *Haldeman,* 163 S. W. 1020, approved by the Supreme Court, in which it was declared that if there was no valid pre-existing debt, the Legislature could not CREATE as well as to pay the debt.

(7) The Circuit Court erroneously construed the Special Act of the Legislature as creating the debt as against the plain language used by the Legislature wherein that tribunal expressly declared:

> "It is the purpose of this Act to declare the indebtedness THUS CREATED BY THE COUNTY OF RED RIVER to be such an evidence of indebtedness as to come within the terms of Acts, 1932."

and against the further language of the statute wherein the Legislature declared:

> "That the amount so determined to have been actually expended in the construction of that part of State Highway No. 37 * * * IS HEREBY DECLARED TO BE A VALID INDEBTEDNESS OF RED RIVER COUNTY."

(8) The Circuit Court so construed the Special Act of the Legislature as to in effect declare that the Texas Legislature had violated the Texas Constitution in making a gift, gratuity or reward out of the public money and thereby violated the rule announced by this court in the case of *National Relations Board* v. *Jones and Laughlin Steel Corporation*, 57 Sup. Ct. Rep. 615, 301 U. S. 1, the rule stated being:

> "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."

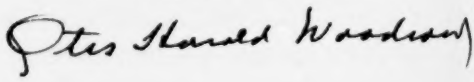
(9) The Circuit Court in approving the action of the trial court in admitting the parol testimony of the bankrupt to vary and contradict the facts found by the State Legislature, violated the rule laid down by this court in *U. S.* v. *Carolene Products Company*, 304 U. S. 144, 58 S. Ct. 778, the rule being:

> "As that decision was for Congress, neither the findings of a court arrived at by weighing the evidence, nor the verdict of a jury, can be substituted for it."

also *Chesebro* v. *Los Angeles County Food Control District et al.*, 306 U. S. 459, 59 S. Ct. 622; and *Clark Directory of Motor Vehicles et al.* v. *Paul Gray*, 306 U. S. 583, 59 S. Ct. 744.

Respectfully petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

OTIS HAROLD WOODROW,
Sherman, Texas,
Attorney for Petitioner.



Supreme Court of the United States

OCTOBER TERM, 1945.

No. _____.

MRS. C. D. PIERCE, TRUSTEE OF THE ESTATE OF J. A. KUNKEL, BANKRUPT, PETITIONER,

VS.

J. A. KUNKEL, B. F. EDWARDS, J. K. FORD, JR., C. M. KENNEDY, LIBERTY NATIONAL BANK IN PARIS, TEXAS, AND RED RIVER NATIONAL BANK IN CLARKSVILLE, TEXAS, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is reported in 151 F. 2d 897, and appears in this record on page 148.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit, here sought to be reviewed, was entered December 7, 1945 (R. p. 146). Application for rehearing was filed December 17, 1945 (R. p. 151), and was denied December 28, 1945 (R. p. 160).

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347, 43 Stat. 938); Rule 38, Sup. Ct. U. S.

STATEMENT.

The principal facts are set forth in the summary statement in the petition *supra*, pp. 2-11.

SPECIFICATIONS OF ERROR.

It is submitted that the United States Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the debt which arose prior to bankruptcy out of advancements of money by the bankrupt to Red River County, and which was after bankruptcy recognized as a valid debt by the State Legislature and the Commissioners' Court, and paid as such, did not pass to and vest in the Trustee in Bankruptcy as a part of the bankrupt's estate under the provisions of Section 70 (a) of the National Bankruptcy Act.

2. In holding "That the debt WAS CREATED by the Special Act of the Legislature."

3. In holding that the Act of the Legislature and the orders and resolutions of the Commissioners' Court

do not constitute a complete bar to the defense offered by the bankrupt and his assignees that the money paid to them is a mere gift, gratuity or reward, and not in payment of a pre-existing debt.

4. In holding that although the bankrupt and his assignees received the interest bearing county warrants under a written stipulation reading "That said warrants shall be delivered to and accepted by said John A. (J. A.) Kunkel, his heirs or assigns in full settlement of the indebtedness due them by Red River County, Texas," that the bankrupt and his assignees were not thereby estopped to deny that the money so received was in full settlement of the indebtedness due them by Red River County, Texas.

5. In affirming the judgment of the trial court, there being no competent admissible evidence of this record to support the judgment of the trial court.

ARGUMENT.

1.

The Circuit Court erred in holding that the debt which arose prior to bankruptcy out of advancements of money by the bankrupt to Red River County, and which was after bankruptcy recognized as a valid debt by the State Legislature and the Commissioners' Court, and paid as such, did not pass to and vest in the Trustee in Bankruptcy as a part of the bankrupt's estate under the provisions of Section 70 (a) of the National Bankruptcy Act.

Section 70 (a) of the National Bankruptcy Act provides:

> (a) "The Trustee of the estate of a bankrupt, and his successor or successors, if any, upon his or their appointment, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * *, to all—
>
> (5) "Property, including rights of action, which prior to the petition he could by any means have transferred * * *.
>
> (6) "Rights of action arising upon contract * * *."

If the bankrupt had any such rights at the time of the filing of his petition, such rights passed to and vested in the Trustee, and the Trustee is accordingly entitled to recover. *Williams* v. *Heard et al.*, 140 U. S. 529, 11 S. Ct. 884; *Milnor* v. *Metz*, 16 Pet. 221; *Erwin* v. *United States*, 97 U. S. 392; *Comegys* v. *Vasse*, 1 Pet. 193; *Clark* v. *Clark*, 17 How. 315, 15 L. Ed. 77; *Phelps* v. *McDonald*, 99 U. S. 298, 25 L. Ed. 473.

This is true even though the claim at the time of the intervention of bankruptcy was barred by the Statute of Limitations, it having been so held by this court in the case of *Erwin* v. *U. S.*, 97 U. S. 392, from which we quote:

> "The demand of a bankrupt which is outlawed, must go to the assignee, for contingencies may arise in many ways which will give value to it. Demands against the government which would be valid between individuals, such as services rendered, goods taken, are property, although there is no court to investigate and pass on their validity and their recognition and payment may depend upon the caprice of the legislature."

This court held in *Williams* v. *Heard et al.*, 140 U. S. 529, 11 S. Ct. 884, that:

> "* * * nevertheless, there was at all times a MORAL OBLIGATION on the part of the government to do justice to those who had suffered in property. * * * There was thus at all times A POSSIBILITY that the government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the act of congress for the distribution of the fund. But the act of congress did not create the rights. THEY HAD EXISTED AT ALL TIMES SINCE THE LOSSES OCCURRED. THEY WERE CREATED BY REASON OF LOSSES HAVING BEEN SUFFERED. * * * IT IS ENOUGH THAT THE RIGHT EXISTS WHEN THE TRANSFER IS MADE, NO MATTER HOW REMOTE OR UNCERTAIN THE TIME OF PAYMENT. The latter does not affect the former. * * * Vested rights *ad rem* and *in re*—possibilities coupled with an interest on claims growing out of property—pass to the assignee."

This court further held in *Erwin* v. *United States*, 97 U. S. 392, that:

"Upon the first point, the argument of the appellant is substantially this: That the claim, at the time the petition in bankruptcy was filed, did not constitute an enforceable demand against the government, and was not, therefore, in its nature assignable property; and that if the claim constituted a demand against the government in the nature of property, it was incapable of assignment * * * This argument is unsound. When the appellant filed his petition in bankruptcy, his claim against the government WAS PROPERTY, though of uncertain value."

This court held in *Comegys* v. *Vasse*, 1 Pet. 193, 7 L. Ed. 108, that:

"Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain, nor the government of the United States, is suable in the ordinary courts of justice, for debts due by either. Yet, who will doubt that such debts are rights? * * * If he possessed claims by abandonment, to the amount of $100,000, WHICH MIGHT, BY FUTURE EVENTS, BE RENDERED MORE OR LESS PRODUCTIVE, AND WHICH MIGHT BE (AS THEY HAVE OFTEN BEEN) SALABLE AND TRANSFERABLE IN THE MARKET; SUCH FUNDS, PRESENT OR EXPECTANT, MIGHT WELL BE DEEMED WITHIN THE LEGISLATIVE POLICY, AND FIT TO PASS TO THE CREDITORS BY ASSIGNMENT. IT MIGHT OTHERWISE HAPPEN THAT LARGE RECOVERIES MIGHT ULTIMATELY VEST IN THE BANKRUPT, FOR HIS OWN EXCLUSIVE BENEFIT, UPON RIGHTS PRE-EXISTENT, AND VESTED AT THE TIME OF HIS BANKRUPTCY."

This court held in *Phelps* v. *McDonald*, 99 U. S. 298, that:

"Nor is it material that the claim cannot be enforced by a suit under municipal law which author-

> izes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. * * * It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. Nor has an adverse decision any final effect. * * * If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property —pass to the assignee. * * * In the light of these considerations, it would be sheer fatuity to deny the substantial character and value of the claim at the time of the transfer by the register's deed."

The Circuit Court seems to have concluded that no debt was created by the advancements because "no writing was entered into between Red River County and Kunkel" (R. p. 147), "nor was any tax levied or other provision made which might evidence the existence of a debt" (R. p. 147).

However, it must be conceded that under the facts found by the Texas Legislature, if these transactions had been between private individuals, and IMPLIED OBLIGATION would have arisen which would be enforceable in an action at law.

The rule in Texas as stated by the Supreme Court in *H. G. Seeligson* v. *Lewis & Williams,* 65 Tex. 215, is—

> "The law implies a promise to pay when one person, at the request of another, discharges for him to a third person a legal obligation."

The foregoing rule has been consistently followed in Texas as reflected in the following cases: *M. C. Lee &*

Company v. *Stowe and Wilmerding,* 57 Tex. 444; *Ware* v. *Galveston R. & S. Railway Company,* 2 Wilson Civ. Cas. Ct. App. 740; *Farmers' National Bank of Cooper* v. *Allard,* 262 S. W. 793; *The American Exchange National Bank of Dallas* v. *Keeley,* 39 S. W. 2d 929; and *First National Bank in Dallas* v. *Keeley,* 61 S. W. 2d 1037.

The question of whether or not an IMPLIED CONTRACT may be enforced against a county when it received money, property or services under a contract which the fundamental law has made void, has been discussed and decided in favor of the recovery by the Supreme Court of Texas, in the cases of: *Austin Bros.* v. *Montague County et al.,* 10 S. W. 2d 718; *Sluder* v. *City of San Antonio,* 2 S. W. 2d 841; and *City of Houston* v. *Finn,* 161 S. W. 2d 776.

The Circuit Court in holding that the county could not be bound by an implied contract is therefore in conflict with the established law of Texas.

In the case of *Sluder* v. *City of San Antonio, supra,* the court said:

> "* * * our courts hold that common honesty and fair dealing require that a county or municipality should not be permitted to receive the benefit of MONEY, property, or services, without paying just compensation therefor. Under such circumstances, a private corporation would clearly be liable under an IMPLIED CONTRACT. There can be no sound reason why the same obligation to do justice should not rest upon a municipal corporation."

The Supreme Court in the *City of Houston* v. *Finn,* 161 S. W. 2d 776, said:

> "The contract that is enforced is one that the law implies because justice demands that a municipality shall not be permitted to receive and retain the

benefits of an agreement without paying the reasonable value of such benefits."

This court said in *Erwin* v. *U. S.*, 97 U. S. 392:

> "Demands against the government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice or favor of the Legislature."

The Trustee urges that the Circuit Court erred in failing to declare that the funds derived from the Interest Bearing County Warrants were an asset of the bankrupt's estate and passed to and vested in the Trustee.

Besides, it was for the Texas Legislature to determine whether or not the facts and circumstances under which the advancement was made created a valid and legal county obligation, and having determined the question, it was not thereafter subject to judicial investigation and review.

2.

The Circuit Court erred in holding "That the debt WAS CREATED by the Special Act of the Legislature."

The Circuit Court has failed to distinguish between the RIGHT and the remedy.

Whatever RIGHT the bankrupt had, arose out of *and at the time* of the advancement of money to the county. The remedy was a creature of the statute.

As said by this court in *Williams* v. *Heard et al., supra,* 140 U. S. 529, 11 S. Ct. 885, 35 L. Ed. 550:

> "But Congress DID NOT CREATE the rights. They had existed at all times since the losses occurred. They were created by reason of the losses

having been suffered. It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment."

It was held in *State* v. *Haldeman*, 163 S. W. 1020, that if no valid claim existed prior to the passage of the Act, none existed afterwards, for the Legislature could not create a debt and authorize its payment.

The statement "That the debt WAS CREATED by the Special Act of the Legislature" is a self-contradicting and erroneous statement of law—a debt being an obligation or demand arising out of a contract, either express or implied, and the Circuit Court having declared that no contract, express or implied, arose out of the advancement of money by the bankrupt to the county.

To say that the Special Act created the debt is merely another way of saying that the Legislature made a gift to the bankrupt out of the County and Road District Highway Funds, which it could not do without violating the Texas Constitution as construed by the Supreme Court of the State in *Jefferson County* v. *Board of County and District Road Indebtedness*, 182 S. W. 2d 908.

3.

The Circuit Court erred in holding that the Act of the Legislature and the orders and resolutions of the Commissioners' Court do not constitute a complete bar to the defense offered by the bankrupt and his assignees that the money paid to them is a mere gift, gratuity or reward, and not in payment of a pre-existing debt.

In relation to the conclusive effect of the Acts of the Legislature in identifying the character of the funds received by the respondents, the Trustee refers as authority to the decision of this court in *U. S.* v. *Carolene Products*

Company, 304 U. S. 144, 58 S. Ct. 778, in which it was held that:

> "As that decision was for Congress, neither the findings of a court arrived at by weighing the evidence, nor the verdict of a jury, can be substituted for it."

and the decision of this court in *Chesebro* v. *Los Angeles County Food Control District et al.,* 306 U. S. 459, 59 S. Ct. 622, in which it was held that:

> "And where, within the scope of its powers, the Legislature itself has found that the lands included in the district will be specially benefited by the improvements, prior appropriate and adequate inquiry is presumed, and the finding is conclusive."

and the decision of this court in *Clark Directory of Motor Vehicles et al.* v. *Paul Gray,* 306 U. S. 583, 59 S. Ct. 744, in which it was held that:

> "The determination of the Legislature is presumed to be supported by facts unless facts judicially known or proven preclude that possibility (Citing cases); hence in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the Legislature has already decided. Its function is only to determine whether it is possible to say that the Legislative decision is without rational basis."

The foregoing opinions are made all the more applicable in this case because the bankrupt and his assignees were the movents in the procurement of the passage of the act and admittedly assisted in the actual preparation of the bill itself (Testimony of Respondent Kennedy R. p. 53).

In relation to the conclusive effect of the orders and resolutions of the Commissioners' Court:

The Commissioners' Court is a constitutional court of exclusive jurisdiction to pass upon claims against the county. It was held by the Texas Supreme Court in *Yoakum County et al.* v. *Gaines County,* 163 S. W. 2d 393; *Tarrant County* v. *Shannon et ux.,* 101 S. W. 2d 4; and *McWilliams et al.* v. *Commissioners' Court of Pecos County et al.,* 153 S. W. 368, that the judgments of the Commissioners' Court are not reviewable and are conclusive over all matters over which they have been given jurisdiction by the constitution, and the facts determined by such court as a basis for its action may not thereafter be re-examined in any collateral matter. The foregoing rule is reinforced here by the fact that the respondents themselves procured these orders.

The Trustee urges in addition to the above, the doctrine of judicial estoppel as pronounced by this honorable court in the case of *State of Oklahoma* v. *State of Texas, defendant, United States of America, intervenor,* 256 U. S. 70, 65 L. Ed. 831, and in the case of *Cromwell* v. *County of Sac,* 94 U. S. 351, 352, 24 L. Ed. 195, in which the rule was declared to be that:

> "A question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein."

If the foregoing rule is not broad enough to be applied to the adjudication of this claim by the Commissioners' Court procured by the respondents to their own benefit, then we respectfully urge that this court should broaden the doctrine sufficiently to make it apply.

This action by the Trustee is governed by the rules of equity practice, and we deem it wholly inequitable for these respondents to obtain the passage of this Special Act and to obtain the orders and resolutions of the Commissioners' Court for their own benefit, and then be permitted to deny the conclusive effect of the action of these tribunals.

4.

The Circuit Court erred in holding that although the bankrupt and his assignees received the interest bearing county warrants under a written stipulation reading "That said warrants shall be delivered to and accepted by said John A. (J. A.) Kunkel, his heirs or assigns in full settlement of the indebtedness due them by Red River County, Texas," that the bankrupt and his assignees were not thereby estopped to deny that the money so received was in full settlement of the indebtedness due them by Red River County, Texas.

It would seem wholly inequitable to permit the bankrupt to acquire these funds upon the claim that the county owed him the money, and then to permit him to retain the funds on the claim the county did not owe him the money.

5.

The Circuit Court erred in affirming the judgment of the trial court, there being no competent admissible evidence of this record to support the judgment of the trial court.

The decision of the Circuit Court is based almost exclusively upon the parol testimony of the bankrupt, admitted over the objection of the Trustee (R. p. 113).

The lower court held that this testimony was admissible because "The record fails to show any statement made by Kunkel or his attorneys from which the Trustee of his bankruptcy estate can successfully assert that they are estopped from denying that a contract was made when the money here in question was advanced" (R. p. 149), and that "it is almost too elementary to state that an issue must have been decided before it can come within the scope of *res judicata.*"

The bankrupt and his assignees admittedly labored "two or three or four months" before the Legislature in their successful effort in getting that tribunal to decide that the advancements of money made by the bankrupt to the county prior to bankruptcy created a valid and legal indebtedness of the county due the bankrupt.

This is freely admitted by the bankrupt in his testimony in response to questions propounded by his own attorney. The question was asked, "Will you tell me how long you worked on it at Austin, before you got the bill through the Legislature?" The bankrupt answered, "At Austin, I worked two or three or four months, I would say. It seems like that was all" (R. p. 119).

The bankrupt's attorney, C. M. Kennedy, testified, "I assisted in the preparation of the necessary legislation to effectuate the payment, and I appeared before the necessary committees of the Legislature to see that it was moved along in proper intervals" (R. p. 53).

What representations were made to the Legislature by these respondents are reflected in the Special Act itself wherein the Legislature found the facts (R. p. 68) from which it concluded that:

> "It is the purpose and intent of this Act to declare the indebtedness THUS CREATED by the County of

> Red River to be such an evidence of indebtedness as comes within the terms of Acts, 1932" (R. p. 69).

and further declared the legislative purpose to be that:

> "The sum so determined * * * is hereby declared to be a valid indebtedness of Red River County" (R. p. 69).

Thus, it affirmatively appears in this record that the respondents did appear before the Legislature, that they did present the facts for decision by that tribunal, that the Legislature did decide what the facts were from the representations of these respondents, and concluded that these facts created a valid indebtedness of Red River County.

The Circuit Court further held that "Kunkel claimed no indebtedness from Red River County" (R. p. 149). Yet the bankrupt, through his attorney, C. M. Kennedy, stated from the witness stand that:

> "* * * and then after the Legislature passed this bill, I made several trips back to Red River County in connection with the presentation of the claim to the county" (R. p. 53).

In prosecuting this claim before the Commissioners' Court, the bankrupt and his assignees procured from that court the following findings of fact:

> "Whereas, this court now finds and determines that the sum of $18,499.96 is the amount of indebtedness due the said John A. (J. A.) Kunkel, his heirs and assigns, under the terms of said House Bill No. 725, and this court finds that said sum nor any part thereof has been repaid to the said John A. (J. A.) Kunkel, his heirs or assigns" (R. p. 75).

The Commissioners' Court had previously adopted the entire fact findings of the Special Act of the Legislature as a

part of its judgment (R. pp. 66-70). Thus, it affirmatively appears in this record that the respondents submitted the facts to the Commissioners' Court for a decision upon the issue of whether or not the antecedent facts created a legal and valid indebtedness of the county, and were successful in obtaining an adjudication of that issue, by a court of competent jurisdiction.

Yet the Circuit Court states: "It is almost too elementary to state that an issue must have been decided before it can come within the scope of *res judicata*."

The Trustee does not assume that the State Legislature and the Commissioners' Court upon their own initiative, and without the presentation of these facts by the bankrupt, voluntarily made an unsolicited gift of this money to the bankrupt.

The Trustee cannot reasonably assume that these decisions made by the State Legislature and by the Commissioners' Court were made without the facts being presented to these tribunals by the bankrupt for decision.

The State Legislature and the Commissioners' Court, acting upon the facts presented to them by the respondents, having decided this issue, the Trustee urges that that decision is conclusive upon the issue and it could not properly be relitigated in the Federal Court.

As said by this court in *State of Oklahoma* v. *State of Texas, defendant, United States of America, intervenor,* 256 U. S. 70, 65 L. Ed. 831:

> "The matter being *res judicata* as a result of a decree in a former suit, it is of no consequence whether it was correctly decided or not."

The plain and simple truth is that the respondents procured this money on the sole and only theory that Red River County did owe the bankrupt a debt which ex-

isted at the time of the intervention of bankruptcy, and having so collected the money, they should not be heard to say in this suit that the State merely made a gift of the money to them in violation of the State Constitution which expressly forbids such use of the County and Road District Highway Fund.

Respectfully the petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court for the Fifth Circuit, to the end that the errors complained of be corrected.

Respectfully submitted,

OTIS HAROLD WOODROW,
Sherman, Texas,
Attorney for Petitioner.

Otis Harold Woodrow